

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

R.J. REYNOLDS TOBACCO COMPANY,

Plaintiff,

v.

SEATTLE-KING COUNTY
DEPARTMENT OF HEALTH, *et al.*,

Defendants.

CASE NO. C06-1506RSM

ORDER DENYING MOTION TO
INTERVENE AND GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on plaintiff's Motion for Summary Judgment and the State of Washington's related Motion to Intervene. (Dkts. #12 and #24). Plaintiff argues that the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331, *et seq.*, preempts King County Board of Health Code ("BHC") § 19.04.115 and Seattle Municipal Code ("SMC") § 6.240.120 as applied to cigarettes. Defendants respond that the plain language of the FCLAA applies only to advertising and promotion, and argue that the codes at issue only regulate how cigarettes themselves are distributed, so they are not preempted by the Act.

The State of Washington has asked to intervene in order to enforce a provision of the Master Settlement Agreement which previously resolved numerous claims against tobacco

1 companies that had been brought by the attorneys general in 46 states, including Washington State.

2 For the reasons set forth below, the Court DENIES the State of Washington's Motion to
3 Intervene and GRANTS plaintiff's motion for summary judgment.

4 **II. DISCUSSION.**

5 **A. Background**

6 Plaintiff has brought this action seeking a declaration that the aforementioned county and
7 city codes are preempted by the FCLAA as applied to cigarettes. Plaintiff desires to promote its
8 cigarettes to adult smokers in Seattle-King County by distributing free samples to adults in places
9 where minors are not allowed. The challenged codes prohibit the distribution of free cigarettes and
10 other tobacco samples in Seattle-King County.

11 On August 24, 2006, the Honorable Franklin D. Burgess, United States District Judge in the
12 Tacoma division of this Court, granted summary judgment in favor of plaintiff in an identical
13 preemption challenge to a Washington state law banning cigarette sampling. Plaintiff then filed an
14 action in this Court, and the instant motion for summary judgment followed. The State of
15 Washington has since moved to intervene.

16 **B. Motion to Intervene**

17 As an initial matter, the Court addresses the State of Washington's Motion to Intervene.
18 (Dkt. #24). The State explains that it brings the motion "to enforce Section V of the [Master
19 Settlement Agreement] MSA which prohibits RJR from initiating facial challenges to tobacco
20 control ordinances enacted prior to June 1, 1998." (Dkt. #24 at 3). For that reason, the State
21 argues that it has a significant protectable interest in the subject of this action, and therefore it
22 should be allowed to intervene as a matter of right. The Court is not persuaded.

23 As plaintiff points out, this action presents an as-applied challenge to the codes at issue, not
24 a facial challenge. The State recognized as much in its complaint filed in its related MSA
25 enforcement action in state court. In that complaint the State acknowledged that, in this action,
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1 plaintiff seeks a request for a declaration that the codes at issue are preempted *insofar as they*
2 *prohibit cigarette sampling*. (See Dkt. #30, Ex. 1). That statement clearly describes an as-applied
3 challenge. Thus, the Court agrees that this action does not appear to implicate a protectable interest
4 of the state, and declines to grant intervention as of right.

5 The State has also asked that, in the alternative, the Court stay the resolution of these
6 proceedings until the related MSA dispute has been resolved in state court. Specifically, the State
7 argues that a stay should be issued based on the *Pullman* doctrine, which allows for a stay in cases
8 where a federal constitutional issue might be mooted or altered based on the state court decision.
9 See *C-Y Development Co. v. Redlands*, 703 F.2d 375, 377 (9th Cir. 1983). Again, the Court is not
10 persuaded. The Ninth Circuit Court of Appeals has made clear that the *Pullman* doctrine does not
11 apply to preemption claims “because preemption is not a constitutional issue.” *Hotel Employees &*
12 *Rest. Employees Int’l Union v. Nev. Gaming Comm’n*, 984 F.2d 1507, 1512 (9th Cir. 1993).
13 Accordingly, the Court finds no basis to stay the current action, and now turns to plaintiff’s motion
14 for summary judgment.

15 C. Preemption By FCLAA

16 I. Summary Judgment Standard

17 Summary judgment is proper where “the pleadings, depositions, answers to interrogatories,
18 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
19 any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ.
20 P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The Court must draw all
21 reasonable inferences in favor of the non-moving party. See *F.D.I.C. v. O’Melveny & Meyers*, 969
22 F.2d 744, 747 (9th Cir. 1992), *rev’d on other grounds*, 512 U.S. 79 (1994). The moving party has
23 the burden of demonstrating the absence of a genuine issue of material fact for trial. See *Anderson*,
24 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact
25 exists, no longer precludes the use of summary judgment. See *California Architectural Bldg.*
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1 *Prods., Inc., v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

2 Genuine factual issues are those for which the evidence is such that “a reasonable jury could
3 return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248. Material facts are those
4 which might affect the outcome of the suit under governing law. *See id.* In ruling on summary
5 judgment, a court does not weigh evidence to determine the truth of the matter, but “only
6 determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549
7 (9th Cir. 1994) (citing *O’Melveny & Meyers*, 969 F.2d at 747). Furthermore, conclusory or
8 speculative testimony is insufficient to raise a genuine issue of fact to defeat summary judgment.
9 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 60 F. 3d 337, 345 (9th Cir. 1995).
10 Similarly, hearsay evidence may not be considered in deciding whether material facts are at issue in
11 summary judgment motions. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F. 2d 665, 667 (9th
12 Cir. 1980).

13 2. *The FCLAA*

14 The FCLAA is “a comprehensive federal scheme governing the advertising and promotion of
15 cigarettes.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001). Enacted in 1965, and
16 amended in 1969 and 1984, the FCLAA is the federal act that requires cigarette packages and
17 cigarette advertisements to carry specified health warnings and bans cigarette advertising on
18 television or radio. *See* 15 U.S.C. § § 1333 and 1335. Congress also barred states from imposing
19 additional health warning requirements on cigarette packages or from regulating cigarette
20 advertising or promotion, in an effort to avoid “diverse, nonuniform, and confusing cigarette
21 labeling and advertising regulations.” 15 U.S.C. § 1331; *see* 15 U.S.C. § 1334 (“No requirement or
22 prohibition based on smoking and health shall be imposed under State law with respect to the
23 advertising or promotion of any cigarettes the packages of which are labeled in conformity with the
24 provisions of this Act”). Both King County and Seattle are included in the term “State” under the
25 Act. 15 U.S.C. § 1332(3).
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1 BHC § 19.04.115 provides:

2 Giving away tobacco and tobacco products is prohibited. No retailer shall give
3 away tobacco or tobacco products to any person. No person shall give away or
offer to give away tobacco products to any person.

4 SMC § 6.240.120 provides:

5 No person shall, on behalf of a tobacco product retailer, distributor, or
6 manufacturer, or any person or entity having an interest in a tobacco product
7 vending machine, give away or distribute, or employ another to give away or
distribute, any sample of any tobacco product to the general public. Each item
given away shall constitute a separate infraction.

8 The question this Court must answer is whether cigarette sampling, or giveaways, is “promotion”
9 under the FCLAA. The Court answers that question in the affirmative.

10 Three federal courts, including this one, have already determined that cigarette sampling is a
11 form of promotion, and, therefore, state laws regulating such sampling are prohibited. *R.J.*

12 *Reynolds Tobacco Co. v. McKenna*, 445 F. Supp.2d 1252 (W.D. Wash. 2006); *Jones v. Vilsack*,
13 272 F.3d 1030 (8th Cir. 2001); *Rockwood v. City of Burlington*, 21 F. Supp.2d 411 (D. Vt. 1998).

14 In *Jones*, the Eighth Circuit Court of Appeals concluded that sampling “naturally falls within the
15 range of meaning ordinarily attributed to the term ‘promotion,’” so sampling is a form of cigarette
16 “promotion” under the FCLAA. *Jones*, 272 F.3d at 1035-37. Similarly, the United States District
17 Court for the District of Vermont concluded that a ban on sampling cigarettes fell into the purview
18 of the FCLAA and was therefore preempted. *Rockwood*, 21 F. Supp.2d at 420. This Court was
19 persuaded by those conclusions, and also determined that cigarette sampling is a form of
20 “promotion” under the FCLAA. *McKenna*, 445 F. Supp.2d at 1257.

21 Defendants ask this Court to reject the reasoning of *McKenna*, *Jones* and *Rockwood*
22 because the courts ignored the presumption against preemption of traditional state police power
23 regulations and neglected to consider the FCLAA’s contextual framework to determine the
24 preemptive scope of section 1334(b). However, this Court is not persuaded by defendants’
25 arguments. First, this Court agrees that the plain and ordinary meaning of “promotion” includes
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1 product sampling. While defendants take issue with Judge Burgess's and the Eighth Circuit's
2 reliance on dictionary definitions of promotion, the reliance on such definitions is standard practice.
3 *See, e.g., United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (explaining that when
4 there is no indication that Congress intended a specific legal meaning for the term, the court may
5 look to sources such as dictionaries for a definition). Likewise, there is no clearly expressed intent
6 in the legislative history contrary to that meaning. *See S&M Inv. Co. v. Tahoe Regional Planning*
7 *Agency*, 911 F.2d 324, 327 (9th Cir. 1990).

8 Second, the Court finds no fault with relying on reports issued by the Federal Trade
9 Commission which describe the promotion of cigarettes as including the distribution of cigarette
10 samples. Indeed, in *Lorillard*, the United States Supreme Court relied on the same FTC reports as
11 discussed in *Jones* and *McKenna*. *See Lorillard*, 533 U.S. at 545.

12 Third, this Court is not persuaded that including sampling in the plain meaning of
13 "promotion" is contrary to the purpose of the FCLAA. As Judge Burgess explained, "allowing
14 individual states to regulate sampling could lead to diverse, nonuniform and confusing regulations
15 governing the promotion of cigarettes in contradiction to the express purpose of the preemption
16 provisions of the FCLAA." *McKenna*, 445 F. Supp.2d at 1258.

17 Furthermore, the Court rejects defendants' argument that subsequent federal legislation
18 compels the Court to disregard the plain language of the FCLAA. The fact that Congress decided
19 to ban cigarette sampling on federal property, and has encouraged states to enact laws prohibiting
20 the sale or distribution of cigarettes to minors, does not mean that Congress also meant to repeal or
21 partially repeal any provision of the FCLAA. *See Lorillard*, 533 U.S. at 552 (emphasizing that the
22 FCLAA does not preempt state laws prohibiting cigarette distribution to minors).

23 Finally, this Court is not persuaded by the analysis of the Supreme Court of California in
24 *Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 124 P.3d 408 (2005), wherein the court
25 determined that the FCLAA does not preempt state regulation of the distribution of cigarettes for
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1 promotional purposes. Like Judge Burgess, this Court believes the California court ignored the
2 plain language of the FCLAA, and that the FCLAA adequately addresses the remainder of the
3 court's concerns with respect to minors. *McKenna*, 445 F. Supp.2d at 1257-58.

4 Accordingly, for all of these reasons, the Court agrees that the FCLAA preempts BHC
5 § 19.04.115 and SMC § 6.240.120 as applied to cigarettes.

6 **III. CONCLUSION**

7 Having reviewed plaintiff's motion for summary judgment, defendants' response, plaintiff's
8 reply, the State of Washington's motion to intervene, the responses and replies to that motion, the
9 declarations and exhibits in support of all of the briefs, and the remainder of the record, the Court
10 hereby ORDERS:

11 (1) The State of Washington's Motion to Intervene (Dkt. #24) is DENIED.

12 (2) Plaintiff's Motion for Summary Judgment (Dkt. #12) is GRANTED, and this case is
13 DISMISSED.

14 (3) The Clerk shall forward a copy of this Memorandum Order to all counsel of record.

15 DATED this _6_ day of February, 2007.

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18 RICARDO S. MARTINEZ
19 UNITED STATES DISTRICT JUDGE
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